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In the Supreme Court of the United States

OCTOBER TERM 1963

No. 968

UNION OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the Supreme Court of the State of California

Appellant's Brief Opposing Appellee's Motion to Dismiss or Affirm

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Introduction.

The factual situation presented by this appeal is neither disputed nor unclear. Appellee has imposed a tax on the use of property in California; it is not disputed that this is a proper *subject* for a California tax.

Appellee has done more than this however, for appellee here seeks to force appellant, as the vendor of the property, to serve as its statutory tax collector and pay the tax to California. The entire justification for requiring appellant to pay the tax is of course that appellant can thereafter re-

cover the tax from Cienega—the true taxpayer. This latter assumption, that appellant can recover the tax from Cienega, depends of course upon whether Cienega is in fact personally liable for the tax. This then is the issue—has the California legislature created a personal liability in Cienega for the tax.[1] It should be emphasized at the outset that it is not the validity of a tax that is in issue here, for the validity of the tax is conceded. The issue is rather the validity of the measures adopted for enforcing the tax.

In the jurisdictional statement we maintained that no matter how clear the power of the state to impose a tax upon the use of property within its borders it cannot make Cienega, a non-resident corporation, personally liable for the tax absent some nexus, connecting factor or link between the state and Cienega.

This position is founded upon two principles of law both of which have been firmly established by the decisions of this Court. The first principle is simply this: The fact that a tax itself is valid does not ipso facto establish that the manner of enforcing the tax is valid. For as this Court has held: "These are separate questions . . . the tax might be valid, although the measures for enforcing it were not." *Shaffer v. Carter*, 252 U.S. 37, 49 (1920). The second principle of law is equally fundamental: the measure of enforcing a tax "cannot under any guise or pretense . . . impose a personal liability upon a non-resident to pay the

1. Appellee does not suggest for a moment—as indeed it could not—that appellant should be required to pay the tax unless *Cienega can constitutionally be made personally liable for it*. The technique of using appellant as a tax collector, shifts the risk of loss that may result from an erroneous assertion of jurisdiction by California to appellant. For if this appeal is dismissed for lack of a substantial federal question, despite the fact that California is wrong in its assertion that it has made Cienega personally liable for the tax, it will be appellant—which is concededly not the true taxpayer—which will be forced to bear the burden of the tax.

assessment or any part of it . . ." *Dewey v. Des Moines*, 173 U.S. 193, 202 (1899).

Thus the fact that California can validly tax the use of ships in California does not establish that the manner of enforcing the tax is valid. Moreover, if, as here, the taxpayer has no contact with the state, the state cannot enforce the tax by creating a personal liability in the taxpayer. It is clear that the present method of enforcing the tax requires the imposition of a personal liability and hence this measure of enforcement must fail.

Appellee has responded to the above argument by maintaining that if a state has jurisdiction over the "subject of the tax," "*it is not significant*" that the tax is made a personal liability of a non-resident (Appellee's Motion to Dismiss, p. 10.).

Appellee seeks support for its argument from two sources, namely, cases sustaining the power to tax a non-resident's income from property located in the state, and, strangely enough, certain principles of choice of law.

Income Tax Cases.

Appellee maintains that cases dealing with the power of states to impose and enforce income taxes establish two propositions, namely, that "it is nonsense" to argue that a tax, such as that here, might be valid and yet the measure adopted for enforcing it, invalid, and second, that "an income tax by its very terms imposes personal liability" and since a tax on income from property in a state has been upheld as to a non-resident owner, a use tax may similarly be made a personal liability of a non-resident owner (Cienega).

As we have seen, the first proposition is wholly incorrect and this Court so held in the very case relied upon so

heavily by appellee. *Shaffer v. Carter*, 252 U.S. 37, 49 (1920).

Furthermore, the opinion in the *Shaffer* case makes it crystal clear that this Court did *not* consider that a tax on income derived from business or property "by its very terms imposes personal liability." This Court said,

> ". . . the . . . fact that a citizen of one state has the right to hold property . . . in another is a very reasonable ground for subjecting such nonresident, *although not personally* yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes . . . (*Id.* at 53) (All emphasis supplied unless otherwise noted.)

In addition it is quite clear that the Court in *Shaffer v. Carter* did not in fact render the non-resident taxpayer involved therein personally liable for an income tax. The Court said:

> "The entire jurisdiction of the State over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction *in rem*. . . . The State did not exceed its power or authority in treating his property interest and his business as a single entity and *enforcing the payment of the tax by the imposition of a lien*, to be followed by execution or other appropriate process, upon all property employed in the business." (*Id.* at 59)

Appellee is thus hoist by its own petard. For appellee relies upon *Shaffer v. Carter*, *supra*, to establish that it "is nonsense" to assert that a tax itself may be valid and yet the measures adopted for its enforcement wholly invalid—but this is precisely what the Court in that case declared. Moreover, appellee's citation of *Shaffer v. Carter*, *supra*, to establish that an income tax "by its terms renders the taxpayer personally liable" for the tax, is equally unavailing for again

the Court held no such thing;[2] and in fact the Court held that the non-resident may be subjected to tax "although *not* personally yet to the extent of his property . . . held . . . therein."

Other authorities are equally clear. For example:

> "'[A] State may provide for the sale of the property upon which [an] assessment [for tax] is laid, but it cannot under any guise or pretense proceed farther and *impose a personal liability upon a non-resident* to

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2. Appellee's assertion that "an income tax is not an *in rem* tax levied on a particular dollar which gives rise to income" must have been advanced in jest. As this Court observed in *Shaffer v. Carter, supra*, the exaction of a tax by enforcing a lien on the income producing property is the exercise of the state's *in rem* jurisdiction: a state does not, of course, need to levy directly on the particular dollar that constitutes the income in question.

The combined effect of the two requirements of legislative jurisdiction present in tax cases, namely, legislative jurisdiction over the taxpayer and legislative jurisdiction over the subject of the tax, is illustrated by the following cases. *General Trading Co. v. Tax Commissioner*, 322 U.S. 335 (1944) and *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944) are cases where the facts establishing legislative jurisdiction over the taxpayer were identical. But in the former case the tax was sustained as imposed on a subject within the state whereas the tax in the latter was struck down as on a subject outside the state's jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945) on the one hand and *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954); *Shaffer v. Carter*, 252 U.S. 37 (1920); *Dewey v. Des Moines*, 173 U.S. 193 (1899) and *New York v. McLean*, 170 N.Y. 374, 63 N.E. 380 (1902) on the other, represent cases where jurisdiction over the subject of the tax was clear but jurisdiction over the taxpayer was in issue. Thus, in *International Shoe Co.* personal liability for the tax was sustained because the taxpayer was doing business in the state, whereas in the remaining cases, such liability could not be sustained despite clear jurisdiction over the subject of the tax, due to the absence of a nexus with the taxpayer.

A comparison of *Miller Bros. v. Maryland, supra* with *Shaffer v. Carter, supra*, further exemplifies this distinction. In *Miller Bros.* the *court* had judicial jurisdiction since it was proceeding *quasi in rem* against the taxpayer's truck but the tax was struck down. The seized truck was not the object of the tax and hence the state was not proceeding pursuant to the *legislature's in rem* jurisdiction. In *Shaffer* on the other hand, the proceeding was against the object of the tax, namely the income producing property. Hence the state was proceeding pursuant to the legislature's *in rem* jurisdiction and the tax was valid.

> pay the assessment or any part of it. . . . The jurisdiction to tax exists only in regard to persons and property or upon the business done within the State, and *such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax* of the nature of the one in question.'" *Dewey v. Des Moines*, 173 U.S. 193, 202-203 (1899).

The language of the Court of Appeals of New York in *New York v. McLean*, 170 N.Y. 374, 63 N.E. 380 (1902) is equally apposite:

> "'When this tax was assessed * * * it certainly put *no personal duty* upon the defendant to pay it. It was only effectual then as a lien upon the property. . . . the state . . . can only enforce the payment of that tax by virtue of its jurisdiction over the property and *it has not* by virtue of that jurisdiction *any power to subject the owner of it to a personal liability for the tax.*'"

Choice of Law Principles Do Not Give California Power to Tax.

Appellee also seeks support for its position by making reference to what is in effect merely a question of choice of laws. Appellee states:

> "For example, a state could enact a statute providing that owners of property located in the state are personally liable for any injury occurring to a person in the state by virtue of the dangerous condition of the property. This would obviously be a proper exercise of the state's police power. But that is entirely independent of whether a local state court could acquire in personam jurisdiction over a non-resident owner defendant. It may be that in such a case the plaintiff (a person injured as a result of the dangerous condition of the property) will have to sue the defendant in a federal court (on the basis of diversity of citizenship) or in the state court of the defendant's residence." (Appellee's Motion to Dismiss or Affirm, p. 12)

What appellee is really saying, of course, is that if a plaintiff who has been injured in California sues a defendant in a New York court, for example, the New York court *may* in the exercise of *its* jurisdiction over the defendant hold that the rights of the parties shall be determined by reference to the standards prescribed by the State of California. In effect the New York court will have held that when the defendant owns property in California, the New York court *may* (but will not necessarily of course) insist that he maintain the property in the manner prescribed by California rules. This is of course an entirely different matter from appellee's theory that California has legislative authority to impose personal liability for taxes on the absentee owner.

Perhaps the fallacy in appellee's analogy can best be made apparent by pointing out that the New York court in the above example might well, in the course of its decision, make reference to a common law principle developed by a California court. This would not mean, of course, that the California court's *judicial* jurisdiction had been extended to New York. Jurisdiction to tax and choice of law are two entirely different concepts. Is there any doubt for example that Maryland law could have been held applicable had Miller Bros. Co.'s truck been involved in an accident in Maryland? This does not, of course, establish legislative jurisdiction in Maryland to render Miller Bros. Co. liable for a tax. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).

Moreover, it is obvious that the very authority cited by appellant fully recognizes this proposition. *Ehrenzweig, Conflict of Laws*, Part One, Section 33 at 112, n. 20 (1959).

In summary the legal principles are simple and clear. A non-resident taxpayer cannot be made personally liable for a tax absent some nexus or connection between the state and non-resident taxpayer *Miller Bros. Co. v. Maryland, supra;*

Shaffer v. Carter, supra; Dewey v. Des Moines, supra; New York v. McLean, supra.[3] Moreover, appellee has not established to the contrary by arguing that if a state may impose a valid tax, it may ipso facto enforce the tax so that it is not significant that the taxpayer is a non-resident. As we have seen, this is simply not the law, *Shaffer v. Carter, supra* at 49. Nor has appellee refuted the above position by arguing that an income tax "by its very terms imposes personal liability," for again as we have seen, this is not the law. *Shaffer v. Carter, supra*, at 53. Finally, the above proposition remains unaffected despite appellee's somewhat confusing citation to principles of choice of law.

Appellee's Semantics.

Despite the clarity of the legal principles involved herein, brief attention should be paid to the semantic assertions advanced by appellee.

Appellee argues that the California legislature can impose personal liability for use tax on Cienega because "Cienega used the two vessels here involved in California to produce rental income" (Appellee's Motion, p. 12.) and because the tax is on the "use of property in California to produce rental income" (Appellee's Motion, pp. 2, 8). Such phrases appear at pages 6, 8, 10, 12 and 16 of Appellee's Motion and are of course designed to produce an intuitively favorable reaction,

3. The irrelevancy of the "crucial" facts which appellee charges make our presentation of the case "inaccurate and misleading", is made apparent by these authorities. There can be no question that the property described in the above cases was "used" within the taxing jurisdictions, that it was so used 100% of the time, that (since in three of the above cases it was real property) it was purchased "with knowledge and intent that such use would occur", that it was "principally" used in the state or that it produced income in the state (*Shaffer v. Carter, supra*, being an income tax case). Accordingly these "crucial" facts were present in the applicable authorities *and deemed insufficient to empower the taxing jurisdictions to impose personal liabilities on the non-resident taxpayers.*

for when we speak of the lessor's use of property in California to produce rental income, we conjure up an idea of "presence" of the lessor in California which can form the basis for imposition of personal liability. But what is really *meant* by these words? Only this: Cienega owned property which was being operated by its lessee in California; and as pointed out in our Juridictional Statement, at pages 9-10, appellee does not establish a "nexus" or "link" between California and an absentee-owner of property simply by giving a more appealing label to the bare fact that it owned property in California.

As discussed above, the state's principal argument in this case is that Cienega's lack of "presence" or "nexus" with California is "insignificant" and that the argument to the contrary "is nonsense". Nevertheless, appellee also seeks to establish this presence or link by implying that Cienega was in fact "present" in California through an agent, Joshua Hendy Corporation. To support this argument, appellee extracts one sentence from paragraph IV of the Stipulation of Facts (Appellee's Motion, p. 4, fn 2) which states that Joshua Hendy Corporation, which is qualified to do business in California, acted as the agent of Cienega with respect to the redelivery of the ships in California on March 18, 1955. The date is significant. The use tax here involved was imposed for the period July 1, 1952 to March 31, 1954. (Stipulation of Facts, paragraph XIII; R 56) but the act upon which appellee relies as showing Cienega's presence in California through an agent occurred *in March 1955, over a year after the occurrence of the last of the events*, which are said to give rise to use tax liability in this case.

In relying on this single sentence in the stipulation, and, more important, in thereafter referring to Cienega only as a corporation "not qualified to do business in California" appellee omits the *immediately preceding sentence* of the

Stipulation of Facts, which is absolutely unequivocal and reads as follows:

> "As shown by Exhibit A attached hereto and incorporated herein by reference Cienega is not now and has never been qualified to do business in the State of California. Cienega does not now have and has never had any officers, employees, or other personnel in the State of California." (Stipulation of Facts, paragraph IV; R 51)

In short, appellee seeks to establish that Cienega was "present" in California during the period July 1, 1952 to March 31, 1954, so as to be subject to the legislative jurisdiction of the state, by quoting only a portion of the relevant material in the Stipulation of Facts; and even that portion shows on its face that any "presence" in California through an agent did not occur until over a year *after* the relevant period.[4]

Summary.

One of the commercial realities of our legal system is that if a corporation is "present" in a state, through a "nexus" or "connection" with the state, that state has legislative jurisdiction to impose a personal liability. If a corporation is not so present but has property in the state, its property is subject to that state's action. But in this case, California seeks to establish the principle that if a foreign corporation owns property in the state, the state obtains legislative jurisdiction to impose *personal liability* on the absentee

4. As we have seen, the connection between California and Cienega during the period the tax was imposed was merely the ownership of property brought into the state by a lessee. Moreover even the connection between Cienega and California that existed a year *after* the period in question is *less* than that connection existing *during* the period in question and found *insufficient* in *Miller Bros. Co. v. Maryland*, 347 U.S 340 (1954).

owner, even though it has never had any "link", "connection", or "nexus" with the state other than the fact that property which it owns was brought into the state.

The question of the power to make a non-resident personally liable for taxes is of no slight significance; indeed, it may be the only protection available to a non-resident taxpayer. For as this Court has held, this Court cannot protect taxpayers from "unwise taxes, merely because they are unwise or unfair or burdensome taxes, merely because they are unfair or burdensome. The wisdom or fairness of the tax . . . are not matters subject to our control or revision." *International Harvester Co. v. Wisconsin*, 322 U.S. 435, 444 (1944) But this Court can, and quite rightly should restrict the states' power over non-residents having no connection with the state other than the ownership of property therein to subjecting such non-residents to tax liabilities only to the extent of the value of its property located in the state. For this is where limits on the states' jurisdiction to tax become meaningful. This is where the non-resident taxpayer may find his only real protection, and this is where this Court, unable to pass upon the wisdom or propriety of the taxes states impose upon those not represented in the state, can limit the imposition of these taxes to the value of the property over which the state has control.

The power California seeks to use here is not needed in order to preserve the taxing power of the states.[5] No one

5. On page 9 of its Motion to Dismiss, appellee quotes from a portion of the California Supreme Court's opinion in this case in which that court opines that a given definition of use was unacceptable because not consistent with the concept that the Sales and Use Tax Law is designed as an integrated whole. Appellee makes no citation to the portion of the opinion from which it quotes—the implication being however that the court is making reference to the constitutional argument advanced by appellant herein. *But this is not so.* The quoted portion of the opinion appears on page 7 of Appendix A to the Jurisdictional Statement, and it is clear

in this case, or any similar case, objects to the California legislature's imposition of use tax liability enforceable *in rem* as against non-resident owners of property. This is standard procedure. No one objects to a vendor being required to collect use tax from owners who are present and use their property in the state—for these latter owners can constitutionally be held personally liable for the tax. But California exceeds the limits of due process when it imposes personal liability for use tax on an owner of property who has never had any connection with the state whatsoever other than the fact his property was here. In these circumstances *in rem* liability for the tax is the measure of a state's taxing powers. Accordingly, California should not be allowed to embark on this new approach which departs so radically from principles which have enabled the states to obtain necessary revenues and commerce to survive.

Respectfully submitted,

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from even a cursory glance at the opinion that the court was in no wise addressing itself to the constitutional problem raised here. Furthermore, the problem in the instant case has nothing to do with whether California can impose a use tax so that it complements the sales tax; the instant case deals only with the technique used in enforcing the tax.